

COUNCIL ACTION FORM

Meeting Date: October 10, 2019

Staff Contact: Ryan Denk, City Attorney

Agenda Item: Non-Discrimination Ordinance

Background / Description of Item:

The proposed Non-Discrimination Ordinance (NDO) for the City of Westwood prohibits discrimination on the basis of sexual orientation and gender identity, and provides an investigation and enforcement process for complaints of such discrimination.

With the passage of this ordinance, the City of Westwood desires to extend its laws to prohibit discrimination and retaliation based upon sexual orientation and gender identity while state and federal laws remain to be interpreted and/or amended, thereby giving individuals in these classes the same protection already provided to individuals with respect to age, race, religion, ethnicity, disability, national origin, ancestry, marital status, and familial status, and to provide a complaint and enforcement process to effectuate such protection.

The proposed NDO is similar to a number of the NDOs adopted by other Johnson County cities. The ordinance as proposed would add a new Article 10 to Chapter 5 – Business Regulations of the Westwood City Code. The proposed ordinance also codifies this non-discrimination investigation and enforcement process for the protected classes with Article 9 – Fair Housing of Chapter 8 – Health and Welfare of the City Code. The City of Westwood adopted the existing Fair Housing Code provisions in 1992 (Ord. 756).

Staff Recommendation:

Pass Ordinance No. _____ regarding prohibited discrimination in employment, public accommodations and housing within the City of Westwood.

ORDINANCE NO. _____

AN ORDINANCE REGARDING PROHIBITED DISCRIMINATION IN EMPLOYMENT, PUBLIC ACCOMMODATIONS AND HOUSING AND ADDING ARTICLE 10 TO CHAPTER 5 AND ARTICLE 9 TO CHAPTER 8 OF THE WESTWOOD CITY CODE.

WHEREAS, the City of Westwood (the "City") is a community with a diverse population of various perspectives and experiences, and such diversity creates a dynamic, welcoming, and prosperous community for residents and visitors; and

WHEREAS, the Westwood City Council specifically finds that discrimination against persons based on sexual orientation or gender identity is wrong and inconsistent with the City's goals, values, and objectives; and

WHEREAS, state and federal laws protect certain classes of individuals in employment, public accommodations, and the sale or rental of housing, and such laws provide a complaint and enforcement process for parties alleging such discrimination in violation of state or federal law; and

WHEREAS, state and federal laws have not been interpreted to protect individuals based on sexual orientation or gender identity, thereby precluding the use of the complaint and enforcement process set out in such state and federal laws; and

WHEREAS, the City desires to extend its laws to prohibit discrimination and retaliation based upon sexual orientation and gender identity while state and federal laws remain to be interpreted and/or amended, thereby giving individuals in these classes the same protection already provided to individuals with respect to age, race, religion, ethnicity, disability, national origin, ancestry, marital status, and familial status, and to provide a complaint and enforcement process to effectuate such protection; and

WHEREAS, the City has a compelling governmental interest in extending protection against discrimination and retaliation on the basis of sexual orientation and gender identity in order to provide equal protection to all citizens of the City; and

WHEREAS, the prohibitions and exemptions set forth in this Article are the least restrictive means of furthering such compelling governmental interest.

NOW, THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF WESTWOOD, KANSAS:

Section 1. A new Chapter 5, Article 10 shall be added to the Westwood Municipal Code to provide as follows:

**ARTICLE 10. PROHIBITED DISCRIMINATION IN
EMPLOYMENT, HOUSING, OR PUBLIC ACCOMMODATIONS AS TO
SEXUAL ORIENTATION OR GENDER IDENTITY.**

5-1001. DECLARATION OF POLICY.

(a) The right of an otherwise qualified individual to be free from discrimination because of that individual's sexual orientation or gender identity is hereby recognized. This right shall include, but not be limited to, any of the following:

(1) The right to pursue and hold employment and the benefits associated therewith without unlawful discrimination.

(2) The right to the full enjoyment of any of the services, advantages or privileges of any place of public accommodation without unlawful discrimination.

(3) The right to engage in property transactions, including obtaining housing for rent or purchase and credit therefor, without unlawful discrimination.

(4) The right to exercise any right granted under this article without unlawful retaliation.

(b) To protect these rights, it is hereby declared to be the purpose of this article to extend the law to prohibit discrimination and retaliation based upon sexual orientation and gender identity and to provide a local process for the acceptance, investigation and resolution of complaints of discrimination and retaliation relating to sexual orientation and/or gender identity arising hereunder.

(c) Such prohibition is in furtherance of providing equal protection to all residents of the City and, for purposes of the Kansas Preservation of Religious Freedom Act (K.S.A. 60-5301 *et seq.*) and other applicable law, the provisions set forth herein are determined to be the least restrictive means of furthering a compelling governmental interest.

(d) Nothing in this article shall be construed to make it lawful to discriminate or retaliate against individuals on the basis of race, color, religion, national origin, sex, age, disability, marital status, familial status, or military status. Such discrimination and retaliation is not addressed in this article because federal and state law consistently address unlawful discriminatory and retaliatory practices related to those characteristics and provide a complaint, investigation and enforcement process for such discrimination and retaliation.

5-1002. DEFINITIONS.

Except to the extent they are in conflict with the definitions below, the definitions contained within the Kansas Acts Against Discrimination (K.S.A. 44-1001 *et seq.*), and amendments thereto, shall apply to this article. For purposes of this article, certain terms shall be interpreted or defined as follows unless the context clearly indicates otherwise.

(a) Aggrieved individual - means any individual who has a good faith belief that such individual has been injured by an unlawful discriminatory practice under this article.

(b) City - means the City of Westwood, Kansas.

(c) Code - means the Code of the City of Westwood, Kansas.

(d) Days - means calendar days. If a deadline falls on a day city hall is not open (e.g. a weekend, a holiday recognized by the City, emergency closure) the deadline will be extended to the next day city hall is open.

(e) Employee - means any individual authorized to perform services within the City for an employer, and includes an officer of the employer, but does not include any individual employed by such individual's parents, spouse or child or in the domestic service of any individual. Employee also does not include an independent contractor.

(f) Employer - means any individual or entity, including but not limited to corporations, partnerships, limited liability companies, associations, labor organizations, mutual companies, joint-stock companies, trusts, or unincorporated organizations, employing four (4) or more employees in the City (including all departments, boards, and agencies thereof), and any City contractor (with respect to contracts between the City and the contractor). For purposes of this article, employer shall not include any non-profit fraternal or social association/corporation or any religious organization.

(g) Gender identity - means an individual's actual or perceived (by the individual or another) gender-related identity, expression, appearance, or mannerisms, or other gender-related characteristics regardless of the individual's designated sex at birth.

(h) Hearing officer - means the City of Westwood Municipal Judge.

(i) Investigator - means the City of Westwood Prosecutor.

(j) Nonprofit fraternal or social association/corporation - means an association or corporation that meets all of the following requirements: (1) it is organized in good faith for social or fraternal purposes; (2) membership entails the payment of bona fide initiation fees or regular dues; (3) there exists a regularly established means of self-government by the members thereof clearly set forth in a constitution or by-laws adopted by the membership; (4) there is a regularly established means of and criteria for admitting members and for expulsion of members by the existing membership or by their duly elected or appointed delegates; and (5) it is not operated, directly or indirectly for purposes of profit for any individual or groups of individuals other than the membership as a whole.

(k) Place of public accommodation – means and shall include every establishment within the City that is open to the public and offers any product, service or facility. The term place of public accommodation shall include, but not be limited to, all taverns, hotels, motels, apartment hotels, apartment houses with one (1) or more tenant units, restaurants or any place where food or beverages are sold, retail and wholesale establishments, hospitals, theaters, motion picture houses, museums, bowling alleys, golf courses and all public conveyances, as well as the stations or terminals thereof. The term place of public accommodation shall not, however, include: (1) a religious organization; (2) any hotel, motel, restaurant or theater operated by a nonprofit fraternal or social association/corporation which restricts its facilities and services to the members of such association/corporation and their guests; or (3) any nonprofit fraternal or social association/corporation, or bona fide civic, political or religious organization, when the profits of such association/corporation or organization, above reasonable and necessary expenses, are solely for its benefit or mission.

(l) Religious organization - means an entity, association, or group such as a church, mosque, temple, synagogue, or other entity, association, or group principally devoted to religious practice or religious teaching.

(m) Rent - means to lease, to sublease, to let or otherwise to grant the right to occupy premises not owned by the occupant in exchange for payment or other consideration.

(n) Rental housing - means any real property, consisting of more one (1) or more dwelling units, which is required to obtain a license or permit pursuant to the provisions of Chapter 5 of the Code.

(o) Respondent - means the individual or entity against whom a complaint alleging discrimination or retaliation has been filed with the City.

(p) Sexual orientation - means an individual's actual or perceived (by the individual or another) emotional, romantic, or sexual attraction to other people, such as heterosexual, homosexual, bisexual, pansexual or asexual.

5-1003. UNLAWFUL PRACTICES.

(a) **Employment.** It shall be an unlawful discriminatory practice for an employer, because of the sexual orientation or gender identity of an otherwise qualified individual:

- i. to refuse to hire or employ such individual, to bar or discharge such individual from employment, or to otherwise discriminate against such individual in compensation or in terms, conditions or privileges of employment without a valid business necessity.
- ii. to limit, segregate, classify or make any distinction in regard to employees, or to follow any employment procedure or practice that, in fact, results in discrimination, segregation or separation, without a valid business necessity.
- iii. to discharge, expel or otherwise discriminate against any person because such person has opposed any practices or acts forbidden under this Article or because such person has filed a complaint, testified or assisted in any proceeding under this Article.

(b) **Housing.** It shall be an unlawful discriminatory practice:

- i. for an individual or entity to discriminate against any individual in the terms, conditions or privileges of the sale or lease of real property or the lease of rental housing, or in the provision of services or facilities in connection therewith, including but not limited to those as set forth in Chapter VIII, Article 9 of the City code, because of sexual orientation or gender identity.
- ii. for any individual or entity to discriminate against any individual in such individual's use or occupancy of rental housing because of the sexual

orientation or gender identity of individuals with whom such individual associates.

(c) **Public Accommodation.** It shall be an unlawful discriminatory practice for the owner, operator, lessee, manager, agent or employee of any place of public accommodation to refuse, deny or make a distinction, directly or indirectly, in offering its goods, services, facilities, privileges, advantages and accommodations to any individual because of sexual orientation or gender identity.

5-1004. EXCEPTIONS.

Nothing in this article shall:

(a) prohibit a fraternal or social association/corporation in fact not open to the public, which as an incident to its primary purpose or purposes provides lodging which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodging to its members or from giving preference to its members.

(b) prohibit a religious organization or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, from limiting the sale, rental or occupancy of real property or rental housing which it owns or operates for other than a commercial purpose to individuals of the same religion, or from giving preference to such individuals, unless membership in such religion is restricted on account of sexual orientation or gender identity.

(c) prohibit an employer from requiring an employee, during the employee's hours at work, to adhere to reasonable dress or grooming standards not prohibited by other provisions of Federal, State, or local law.

(d) be construed to mean that an employer shall be forced to hire unqualified or incompetent personnel, be forced to discharge qualified or competent personnel, or be forced to retain personnel when there is a legitimate non-discriminatory or non-retaliatory reason to terminate employment.

(e) be construed to prohibit an employer from requiring all of its employees, as a condition of employment, to utilize the employer's applicable established internal human resource procedure(s) to address any allegation of discrimination or retaliation in the workplace. The enforcement by an employer of any such requirement shall not, in itself, be deemed a violation of this article.

(f) be construed to require any person or entity subject to this article to make changes requiring a building permit to any existing facility, except as otherwise required by law.

(g) be construed to prohibit an employer or place of public accommodation to post signs for restrooms and dressing rooms based on gender, or to approve, permit, authorize, or serve as a defense to conduct that would constitute the crimes of lewd and lascivious conduct or voyeurism as defined and prohibited by state law or the City code.

(h) apply to the extent the application or enforcement hereof is found, by a court of competent jurisdiction, to violate a person's rights protected under the Kansas Preservation of Religious Freedom Act, K.S.A. 60-5301 *et seq.*, as amended.

(i) be construed to preclude any person from filing a complaint under this Article from seeking any other relief under local, state or federal law.

5-1005. DEFENSES.

It shall be a defense to any allegation of an unlawful discriminatory practice:

(a) that the individual or entity did not know the Aggrieved Individual's sexual orientation or gender identity.

(b) that the individual or entity acted in good faith and had reasonable grounds for believing that an act or omission was not a violation of this Article.

(c) that any adverse action taken against the Aggrieved Individual would have been taken regardless of the individual's sexual orientation or gender identity (*i.e.* the Aggrieved Individual violated the law, a workplace rule, a lease provision or policy applicable to all similarly situated individuals, such as employees, lessees, customers, etc.).

5-1006. ENFORCEMENT.

- (a) Any Aggrieved Individual may file a written, verified complaint with the city clerk. The complaint may be filed personally or through an attorney (or if a minor, through the minor's parent, legal guardian or attorney). Any such complaint shall state sufficient information to identify the factual information supporting the alleged unlawful discriminatory practice, and shall state the names and contact information of the Aggrieved Individual, the individual(s) and/or entity/entities alleged to have committed the unlawful discriminatory practice(s), and a description of the alleged unlawful conduct.
- (b) The complaint form must be filed within sixty (60) days after the alleged unlawful discriminatory practice, unless the act complained of constitutes a continuing pattern or practice of discrimination, in which event it must be filed within sixty (60) days after the last act of discrimination. If the complaint contains allegations of alleged unlawful employment discrimination and the Aggrieved Individual's Employer has an internal human resources procedure to address allegations of discrimination in the workplace (an "Internal Process") and the Employer also has a policy prohibiting discrimination in the workplace on the basis of an individual's sexual orientation or gender identity, then the Aggrieved Individual must first exhaust this Internal Process before the City will process a complaint, in which case the time to file such complaint is extended to thirty (30) days after the date of the final decision in the Internal Process. The Investigator may waive this prior exhaustion requirement upon demonstration to the Investigator's satisfaction that prior exhaustion of the Internal Process would be futile. Futility shall be conclusively established if the Employer fails to render a final decision on the Aggrieved Individual's complaint within forty-five (45) days from the date of the filing of the complaint.
- (c) The complaint form shall be submitted to the Investigator. Upon receipt of a complete complaint, the Investigator shall notify the Respondent(s) of the complaint, providing

sufficient details related to the complaint so the Respondent(s) may respond. The Investigator shall give the Respondent(s) thirty (30) days to file a written answer to the complaint, and to provide any documentation or evidence related to the complaint. The Investigator may, at the request of Respondent(s), extend the answer period an additional thirty (30) days. If the Respondent(s) charged with violating the provisions of this article is the City, the City will engage an independent investigator who shall not otherwise be an employee, agent, or contractor of the City and shall not have any association with the complainant or the Respondent(s).

- (d) Following the conclusion of the answer period, the Investigator may initiate an investigation period for further investigation, requesting that the complainant and/or Respondent(s) provide additional information, documentation or testimony as needed to facilitate the investigation of the complaint. This investigation period shall be concluded within sixty (60) days after the Investigator's last request for information, unless the Investigator notifies the complainant and the Respondent(s) in writing of the need for additional time and reason(s) therefore.
- (e) Within thirty (30) days after the conclusion of the investigation period, the Investigator will review all evidence received during the investigation and make a determination, within the Investigator's sound discretion, whether probable cause exists that the Respondent(s) committed an unlawful discriminatory practice.
- (f) If the Investigator finds that probable cause does not exist, then the Investigator shall notify the complainant and the Respondent(s), and no further action shall be taken by the City. Any individual making false, malicious, or unfounded accusations against a person or entity subject to this article is guilty of a violation and upon conviction thereof shall be punished by a fine of \$100.00 for each such violation.
- (g) If the Investigator finds that probable causes exists that an unlawful discriminatory practice was committed by Respondent(s), the Investigator shall notify the complainant and Respondent(s) and the Investigator may attempt to engage the parties in conciliation and encourage them to settle the complaint between the parties. Alternatively, the parties may, by mutual agreement, select and pay for, at their own cost, a mediator or arbitrator to mediate or arbitrate the discrimination complaint. The parties may elect to mediate the complaint at any point following the initial filing of the complaint. In the event that a Respondent agrees to mediate a complaint prior to filing the Respondent(s)' answer, the Investigator may stay the requirement of filing an answer. Any such stay shall be lifted in the event that mediation is unsuccessful or in the event that Respondent withdraws its consent to mediate in which case the Respondent shall be required to file its answer within fifteen (15) days following either the conclusion of the mediation, or the date of the Respondent's withdrawal of consent. The Investigator may extend the time for signing a settlement agreement for good cause and with written notice to the parties.
- (h) If the complaint could not be conciliated and settled within sixty (60) days of the date of the Investigator's determination that probable cause exists (or by the last day of any extension, whichever is later), the complaint shall be set for a hearing before the hearing officer. The parties will be given at least ten (10) days' written notice of the date, time and place of the hearing. At such hearing, the parties shall be entitled to call witnesses and to present such other evidence as appropriate. The hearing shall be conducted in accordance with such procedures as may be established by the hearing officer which procedures shall generally be consistent with K.S.A. 77-523 and K.S.A. 77-524 of the

Kansas administrative procedure act, as amended. The Hearing Officer shall also establish his or her own rules of evidence, which are not required to be the same rules of evidence used in courts of law. At such hearing the Aggrieved Individual and the Respondent(s) shall each be entitled to call witnesses and to present such other evidence as appropriate. The Investigator is not required to participate, but may also call witnesses and present such other evidence as he/she deems appropriate. The hearing officer shall issue a written determination within thirty (30) days of the date of the hearing. The determination shall indicate whether the preponderance of the evidence proves that Respondent committed the unlawful discriminatory practice against the complainant, and shall set forth the essential elements of the determination.

- (i) If the hearing officer finds that a violation of this article has occurred, the hearing officer may award to the complainant a civil penalty in the amount of up to \$1,000.00 for each violation. In addition, the hearing officer shall have the authority to revoke or suspend any license or licenses issued by the City to a party found to be in violation of this article. The Hearing Officer's determination to revoke or suspend any license or licenses issued by the City shall not become effective until after the exhaustion of all appeal rights as provided for herein. The hearing officer may condition the reinstatement of any revoked or suspended license upon such terms and conditions as the hearing officer finds are fair and appropriate and reasonably calculated to effect compliance with the requirements of this article.
- (j) Each party is to bear its own attorneys' fees, if any.
- (k) Any party aggrieved by a determination of the hearing officer under this section may appeal that determination to the District Court of Johnson County, Kansas, in accordance with K.S.A. 60-2101(d), and amendments thereto. Within thirty (30) days of service of the notice of appeal pursuant to K.S.A. 60-2101(d), as amended, or within further time allowed by the court or by other provision of law, the City shall transmit to the court a certified copy of the written determination of the hearing officer and a certified copy all evidence presented at the hearing. On appeal, the district court may enter such order or judgment as justice shall require, and may award the prevailing party its court costs in accordance with State law.
- (l) The Investigator shall maintain all evidence received during the investigation for a period of two (2) years after the deadline for appeal or completion of appeal, whichever is later. The hearing officer will maintain all evidence presented at the hearing for a period of two (2) years after the deadline for appeal or completion of appeal, whichever is later. In no event shall the Investigator or hearing officer permit or cause the loss or destruction of any evidence related to a complaint until all appeal rights have been fully and finally adjudicated.
- (m) The filing of a complaint for the alleged violation of this article or a response thereto shall in no way preclude any party from seeking other relief under state or federal law.

5-1005. CITY CONTRACTS.

The City may condition any contract into which it may enter upon adherence to the requirements of this article, and a violation of this article may be a basis for the termination of any such contract. The hearing officer shall also communicate the finding of a violation to the mayor and city clerk so that the City may determine if the Respondent has any

contracts with the City and if the violation found by the hearing officer may result in termination of such contracts or otherwise affect such contracts.

5-1006. SEVERABILITY.

Should any section, subsection, sentence, clause or phrase of this article, or the application thereof to any person or circumstance, be declared to be unconstitutional or invalid or unenforceable, such determination shall not affect the validity of the remaining portions of this article.

Section 2. Chapter 8, Article 9 of the Westwood Municipal Code shall be amended in its entirety to provide as follows:

ARTICLE 9. FAIR HOUSING CODE

8-901. FAIR HOUSING.

(a) It shall be unlawful for any person to refuse to sell or rent after the making of a bona fide offer, to fail to transmit a bona fide offer or refuse to negotiate in good faith for the sale or rental of, or otherwise make unavailable or deny, real property to any person because of race, religion, color, gender, national origin, ancestry, disability, marital status, military status, or familial status.

(b) It shall be unlawful for any person to discriminate against any person in the terms, conditions or privileges of sale or rental of real property, or in the provision of services or facilities in connection therewith, because of race, religion, color, gender, national origin, ancestry, disability, marital status, military status, or familial status.

(c) It shall be unlawful for any person to make, print, publish, disseminate or use, or cause to be made, printed, published, disseminated or used, any notice, statement, advertisement or application, with respect to the sale or rental of real property that indicates any preference, limitation, specification or discrimination based on race, religion, color, gender, national origin, ancestry, disability, marital status, military status, or familial status, or an intention to make any such preference, limitation, specification, or discrimination.

(d) It shall be unlawful for any person to represent to any person because of race, religion, color, gender, national origin, ancestry, disability, marital status, military status, or familial status that any real property is not available for inspection, sale or rental when such real property is in fact so available.

(e) It shall be unlawful for any person for profit, to induce or attempt to induce any person to sell or rent any real property by representative regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, religion, color, gender, national origin, ancestry, disability, marital status, military status, or familial status.

(f) It shall be unlawful for any person to deny any person access to or membership or participation in any multiple-listing service, real estate brokers organization or other service, organization or facility relating to the business of selling or renting real property, or to discriminate against him or her in the terms or conditions of such access,

membership or participation, because of race, religion, color, gender, national origin, ancestry, disability, marital status, military status, or familial status.

(g) It shall be unlawful for any person to discriminate against any person in his or her use or occupancy of real property because of the race, religion, color, gender, national origin, ancestry, disability, marital status, military status, or familial status of the people with whom such person associates.

8-902. SEXUAL ORIENTATION OR GENDER IDENTITY.

The provisions of Chapter V, Article 10 of the City code (Prohibited Discrimination in Employment, Housing, or Public Accommodations as to Sexual Orientation or Gender Identity), as they relate to housing, are hereby incorporated herein by this reference.

8-903. ENFORCEMENT.

To the extent of state and federal legal processes to address allegations of discrimination based on race, religion, color, gender, national origin, ancestry, disability, marital status, military status, or familial status, the City may decline to accept a complaint under this article and defer to the appropriate state or federal agency in which such complaints may be filed.

8-904. DEFINITIONS.

Except to the extent they are in conflict with the definitions set forth in Chapter V, Article 10 of the City code (Prohibited Discrimination in Employment, Housing, or Public Accommodations as to Sexual Orientation or Gender Identity), the definitions contained within the Kansas Acts Against Discrimination (K.S.A. 44-1001 *et seq.*), the Kansas Age Discrimination in Employment Act (K.S.A. 44-1111 *et seq.*), and the Discrimination Against Military Personnel Act (K.S.A. 44-1125 *et seq.*), and amendments thereto, shall apply to this article.

Section 3. Severability. If any section, subsection, sentence, clause or phrase of this Ordinance is, for any reason, held to be invalid, such invalidity shall not affect the validity of the remaining portions of this Ordinance and the Governing Body hereby declares that it would have passed the remaining portions of this Ordinance if it would have known that such part or parts thereof would be declared invalid.

Section 4. All prior ordinances inconsistent herewith are hereby repealed.

Section 5. This Ordinance shall be in full force and effect from and after its passage, approval, and publication as provided by law.

PASSED by the Governing Body this 10th day of October, 2019.

APPROVED by the Mayor this 10th day of October, 2019.

John M. Yé, Mayor

ATTEST:

Frederick L. Sherman, City Clerk

Approved as to form:

Ryan B. Denk, City Attorney